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No. 90-1123

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DONALD GAIGALAS AND RONALD L. TUCKER,
Petitioners,

v.

BARBARA BUFFINGTON AND DAVID BUFFINGTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Instead of addressing whether the important and recurring constitutional questions presented are worthy of this Court's attention, respondents devote all but four pages of their 30-page brief to a completely disingenuous series of "waiver" arguments. In fact, the two questions presented were not waived in any court. Moreover, for purposes of this petition, it is absolutely indisputable that both questions were fully addressed *and* decided in the published opinion of the Fourth Circuit. See Pet. App. 8a-15a.

At the end of the day, the questions presented regarding the scope of a state actor's affirmative custodial obligations under the Due Process Clause and the right to qualified immunity from claims relating to such obligations are extraordinarily important to the operation of local government. There is a conflict among the circuits on both of these issues, and therefore, the questions presented clearly are appropriate for review by this Court.

1. The "due process" issue is "[w]hether the Due Process Clause . . . imposes upon state actors an affirmative obligation to prevent a person in government custody from committing suicide." Pet. i. This Court's standard for determining whether a question was "waived" below is well-established: this Court ordinarily will not review a question not pressed or passed upon by the court below. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958) ("[o]nly in exceptional cases will this Court review a question not raised in the court below"); see *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *Husty* v. *United States*, 282 U.S. 694, 701-02 (1931); *California* v. *Taylor*, 353 U.S. 553, 556 n. 2 (1957); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam); *Kibbe*, 480 U.S. at 266 (O'Connor, J., dissenting).

Respondents—with good reason—never cite this Court's "waiver" rule because the question presented was *both* pressed and passed upon by the court below. The Fourth Circuit expressly stated that:

> All the appellants challenge the [judgment] on the ground that the asserted constitutional right to some measure of protection from suicide under these circumstances does not exist. Specifically, the appellants contend that the due process clause of the fourteenth amendment does not require the state to take any steps to prevent a person in its custody from committing suicide . . . .

Pet. App. 8a. The court considered the arguments on both sides of the question and concluded that it would

"reject th[e] [appellants/petitioners'] argument." *Id.* It is difficult to imagine a situation where a purely legal question is more clearly pressed and passed upon by an appellate court.

Moreover, to prove that petitioners raised precisely this point in the district court, this Court need look no further than *respondents'* brief, which quotes petitioners' counsel's argument to the district court that "[t]here is no constitutional standard requiring inmates to be protected from committing suicide." Opp. 8 (quoting App. 40a).[1] Thus, to the extent that this Court's waiver rule requires a question to be presented to the district court as well as the court of appeals, the question here was presented to and passed upon by the district court.[2]

2. With respect to the waiver of the qualified immunity issue, respondents again provide this Court with evidence that the issue specifically was raised in the district court. Respondents have provided the Court with a copy

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[1] Respondents attempt to prove a negative by quoting extensively from portions of petitioners' submissions in the lower courts that were, in many cases, addressed to different facets of the due process issue. However, even a cursory review of the pleadings reproduced by respondents demonstrates that the due process and qualified immunity issues were presented in an appropriate fashion in both courts. See Brief in Opposition Appendix ("Opp. App."), at 40a (raising due process issue); *id.* at 3a-5a (raising qualified immunity issue by reliance on *Gagne*).

[2] Respondents rely on the fact that this issue was not raised in a motion for directed verdict or motion for judgment notwithstanding the verdict. *If* this were a question of fact or of the sufficiency of the evidence, perhaps this might be relevant, see Fed. R. Civ. P. 50, but there is no obligation to "preserve" a purely legal argument in the fashion suggested by respondents.

Moreover, although the questions presented actually were raised in both courts below, this Court previously has suggested that it may decide purely legal issues regardless of whether such issues have been pressed or passed upon by the courts below. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n. 23 (1982); *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985).

of petitioners' memorandum in support of their motion to dismiss, or in the alternative, for summary judgment, in which the qualified immunity argument clearly is set forth. Petitioners cited *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), for the general principles of qualified immunity and argued that in *Gagne* v. *City of Galveston*, 805 F.2d 558 (5th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987),

> the Court of Appeals for the Fifth Circuit dismissed claims factually and legally identical to the claims in the case at bar, using the following language:
>
> > . . . The plaintiffs have not cited any case suggesting that a constitutional duty to protect prisoners from self-destructive behavior was clearly established at the time Gagne was arrested. Indeed, the case of *Partridge* v. *Two Unknown Police Officers*, 791 F.2d 1182 (5th Cir. 1986), shows that the possible existence and scope of such a duty has only very recently begun to attract attention in this circuit. Thus, under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1932), and *Elliot* v. *Perez*, 751 F.2d 1472 (5th Cir. 1985), the claim against Putnal must be dismissed.

Opp. App. 4a-5a. The district court rejected this argument, but respondents are absolutely incorrect in stating that the issue of qualified immunity under *Harlow* was "waived" in the district court.

Petitioners reasserted their right to a qualified immunity in the Fourth Circuit. They argued, *inter alia*, that "the doctrine of qualified immunity protects public officials even when there is a finding that constitutional rights have been violated." See Pet. App. 68a (quoting petitioners' reply brief in Fourth Circuit). According to petitioners, respondents had failed to meet their burden of showing that the right in question—the right to be protected from suicide as a condition of custody—was " 'clearly established in a particularized sense so that

the contours of the right are clear enough for any reasonable official in the [petitioners'] position to know that what the official is doing violates that right.'" Pet. App. 69a (citations and internal quotation marks omitted).

Although the Fourth Circuit characterized petitioners' arguments in support of their right to qualified immunity as "confused" or unclear, it acknowledged that the reply brief—which is quoted above—could be read "as raising a distinct issue of qualified immunity." Pet. App. 13a. The court below nevertheless "decline[d] to give the appellants the benefit" of "a liberal reading" of their opening brief and, accordingly, refused to consider the qualified immunity issue because, in the courts' view, it had been insufficiently argued in the opening brief.[3]

Putting aside the question of whether the court below erred—for reasons set forth in the petition (see Pet. 14-15)—in refusing to rule upon the constitutional immunity question because it was inadequately argued, the *issue* of qualified immunity was raised or litigated in *both* of the lower courts. The treatment of this issue below is more than necessary to preserve the question for review in this Court. *Kibbe*, 480 U.S. at 259; see *id.* at 266 (O'Connor, J., dissenting).

At bottom, respondents' "waiver" arguments reflect no jurisdictional, statutory or prudential bar to this Court's review of the important questions presented. In fact, the

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[3] The immunity to which petitioners are entitled is immunity from trial. Thus, the question of whether the immunity is applicable is purely a question of law. See, *e.g.*, *Rakovich* v. *Wade*, 850 F.2d 1180, 1204 (7th Cir.) (qualified immunity is "legal question reviewed *de novo* by the appellate court . . . [which is] not bound by the officers' incorrect citation of the law . . . ."), *cert. denied*, 488 U.S. 968 (1988). Respondents' reliance on arguments relating to the motion for directed verdict or the jury instructions (see, *e.g.*, Opp. 18-19)—which are solely relevant to resolution of questions of fact—is misplaced. If petitioners are entitled to immunity, judgment should be entered in their favor, regardless of the conclusions of the jury or of any court below. See *supra*, note 2.

weakness of respondents' "waiver" argument speaks volumes regarding respondents' confidence in their ability to convince this Court that the questions presented are not otherwise worthy of review.

3. If the "waiver" arguments are removed from the opposition, respondents' only assertion is that the Fourth Circuit was correct in finding an affirmative duty to prevent custodial suicide in the Due Process Clause. Opp. 11-14. That argument rests on nothing more than respondents' continuing refusal to acknowledge that this is *not* a case about a failure of *medical* care but rather a case about *custodial* care.[4] On the issue of what custodial obligations arise directly out of the Due Process Clause, there is a conflict in the circuits, which this Court never has addressed. See Pet. 8.

Respondents' attempt to distinguish the conflict between *Danese* v. *Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1473 (1990) and the decision below misreads both the facts and the holding of *Danese*. Respondents state that "*Danese* involved a situation involving a *latently* suicidal detainee." Opp. 26 (emphasis in original). Thus, according to respondents, the holding in *Danese* is limited to claims of inadequate "screening" for suicidal tendencies. Respondents' assertion is plainly belied by the Sixth Circuit, which described the facts as follows:

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[4] See Pet. 8-11. With respect to his *medical* care, the police were expeditiously preparing the papers necessary to commit James Buffington to a hospital at the time of his suicide. Respondents have never suggested that the police acted inappropriately with respect to the "medical" aspect of their response. The "constitutional injury," if any, arises not from a failure of medical care but from the fact that James Buffington was placed, unattended, in a cell with horizontal bars across the ceiling. The claim has nothing to do with medical care and everything to do with the conditions of his custody; thus, respondents' only challenge to petitioners' conduct focuses on the custodial treatment of James Buffington, not his medical care. See Pet. 8.

> Danese told [the police] that he was going to kill himself and talked about methods of killing himself, but the officers did nothing. He was placed fully clothed in a regular cell.

875 F.2d at 1243. The argument in *Danese*—which is identical to respondents' argument in this case—is that the police "violated Danese's clearly established right to safe confinement." *Id.* at 1245.[5]

The Sixth Circuit, unlike the court below, rejected the position that "police officers must detect suicidal prisoners and put them into suicide-proof facilities." *Id.* at 1244. The court distinguished cases involving claims of failure to provide "requested medical care" from the claim based on failure to take "extraordinary measures to restrain Danese." *Id.* at 1244. With respect to conditions of custody, the court noted that it could find no "cases holding that there exists a clearly established right to these suicide prevention facilities." *Id.* at 1245. Accordingly, it concluded that the individual police officers were immune from constitutional liability for failure to prevent Danese's suicide.

4. Finally, there can be no question that the issues in this case are of tremendous practical significance. Respondents note that their expert testified about suicide prevention in jails, and they point out that he explained that "training" is not very expensive. Opp. 4 n. 1. However, respondents do not dispute petitioners' claim that if a duty to prevent custodial suicide is read into the Due Process Clause, there will be significant costs incurred, in building or remodeling jails or employing additional guards, in order to create "suicide-proof" facilities. Nor do they dispute petitioners' common sense observation that such expense will be particularly burdensome on

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[5] Specifically, the plaintiffs in *Danese* asserted a due process right to "safe confinement conditions" while in police custody, including a "detoxification cell without horizontal bars and with a working television monitor." *Id.* at 1245.

smaller and more rural communities that lack the resources to meet these demands. Whether the burdens of such a constitutional obligation should be borne by all the cities, towns and counties in North Carolina, South Carolina, Virginia and Maryland is a matter of great practical significance that warrants a decision by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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